Supreme Court, U.S.
FILED
SEP 18 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 1683

EDWARD B. BENJAMIN,
Plaintiff-Petitioner,

versus

WESTERN BOAT BUILDING CORPORATION,
Defendant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Respondent herein, Western Boat Building Corporation ("Western Boat" hereinafter), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari submitted by Petitioner, Edward B. Benjamin ("Benjamin" hereinafter).

By way of background, this case is a suit on a contract, whose focal issue is jurisdiction over the person of Respondent. Respondent's pleas to be dismissed for lack of jurisdiction were denied by the district

court, but upheld by the Appellate Court (the United States Court of Appeals for the Fifth Circuit).

Respondent submits that the decisions of the Appellate Court, dismissing Benjamin's suit, were perfectly correct both on original consideration and on denial of rehearing and denial of rehearing en banc. Respondent submits that the opinion of the Court of Appeals shows clearly that it weighed carefully all of the facts in this case, that it properly applied the law of jurisdiction *in personam* and that the dismissal of this suit was proper. The Appellate Court's decisions are reported as *Benjamin v. Western Boat Building Corporation,* 472 F.2d 723 (5th Cir., 1973); reh.den. (App. A); rehearing en banc denied, 474 F.2d 1347-48 (5th Cir., 1973) (App. B).[1]

Benjamin's litigation against Western Boat commenced in 1969 with the filing of the same complaint in two separate Federal district courts: the U. S. District Court for the Eastern District of Louisiana, New Orleans Division, and the U. S. District Court for the Western District of Washington, Southern Division. The latter suit is still pending, inasmuch as the United States Court of Appeals for the Ninth Circuit has reversed in part a summary judgment in favor of Western Boat, and has remanded the case to the District Court. *Benjamin v. Western Boat Building Corporation,* 475 F.2d 1085 (9th Cir., 1973).

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[1]References herein to the Appendix refer to the Appendix to the Petition for Writ of Certiorari, filed by Petitioner and are abbreviated as "App.". The opinion of the Fifth Circuit in this case will be referred to merely as *Benjamin,* with the appropriate page reference.

Although, Benjamin states in his Petition for Writ (at page 8) that the issue before this Court is one of law, one would assume from a reading of his Statement of the Case that he is attempting to make it one of fact, also. There is no dispute of fact, and the following facts were considered by the Appellate Court and are well documented by the record. *Benjamin*, 472 F.2d 723, at 727-728; (App. A, at 9a-11a).

In 1957, Benjamin retained a Virginia marine architect, one Roger McAleer, in the City of Washington, D. C. to design a new sailboat. McAleer agreed to produce specifications and drawings, take bids for construction of the vessel, make recommendations to Benjamin on the bids, and make inspection trips at the boat builder's yard.

In August, 1958, after more than a year of design work, McAleer requested a bid from Western Boat in the State of Washington. Western Boat submitted its bid to McAleer in Alexandria, Virginia and sent a copy to Benjamin at his part-time home in Greensboro, North Carolina. In response, Western Boat received a letter from Benjamin in Greensboro, North Carolina advising that he, Benjamin, had signed four copies of the contract, was forwarding them by separate cover, and requesting return of the executed copies to Greensboro, North Carolina.

On September 30, 1958, Western Boat accepted and executed the contract at Tacoma, Washington. Western Boat then mailed copies of the executed contract to Benjamin at Greensboro. Shortly after, Benjamin

sent a letter from Greensboro to Western Boat at Tacoma, acknowledging Western Boat's letter of September 30th and receipt of the executed copies of the contract.

The Contract. The contract called for *construction* of the vessel at Tacoma, Washington in accordance with McAleer's plans and specifications. The contract called for Benjamin to furnish certain materials for installation in the vessel at Tacoma, Washington. *Payments* to Western Boat of the contract price were to be made in Tacoma. The contract called for *inspections* by Benjamin or McAleer to take place at Tacoma. *Delivery* of the vessel was specified in Tacoma, and *acceptance* of the vessel by Benjamin at Tacoma was likewise required by the contract.

After execution of the contract, work began immediately at Western Boat's yard in Tacoma. There then followed a series of communications among Benjamin, Western Boat, and McAleer. Benjamin initiated practically all of the correspondence, and he himself described it as pertaining to "a few little details of furnishing things" or other "odd things to put aboard the boat". Benjamin asked questions about the construction progress, inquired as to the payment schedule (which was set out in the contract), volunteered comments about his plans for the boat, and frequently wrote just to say where he was. He directed substantial amounts of correspondence from Greensboro, North Carolina, from Coconut Grove, Florida, or from a boat on the waters.

From date of the contract, September 30, 1958, through the end of Western Boat's undertaking, August of 1959, construction of the vessel in every aspect took place at Western Boat's yard in Tacoma, Washington. The boat was delivered to Benjamin and accepted by him in the State of Washington. Further, at no time did any representative of Western Boat come to Louisiana.

At the time of his acceptance of the vessel, in August, 1959, Benjamin not only exercised rights of legal ownership but also took actual physical control of the vessel - all in the State of Washington. Benjamin then sailed his vessel on the West Coast and shipped it from San Francisco, California to Tampa, Florida. Final adjustment of the bill and payment by Benjamin to Western Boat followed, several months later. Nearly ten years after acceptance of the vessel, Benjamin commenced this litigation and its counterpart in the State of Washington.

The absence of contacts by Western Boat with the State of Louisiana is further seen from the following facts, all found by the Appellate Court. In fact, Western Boat: (1) is a corporation organized under the laws of the State of Washington; (2) is not qualified to do business in the State of Louisiana; (3) has not incurred nor paid taxes to the State of Louisiana; (4) has not appointed an agent for service of process in Louisiana; (5) has no office, no place of business, no officers, no agents, no employees, no salesmen, no licenses, no franchises, and no distributors in the State of Louisiana; (6) is not listed in the telephone directories in

Louisiana; (7) has no assets in Louisiana (8) does no advertising in any of the Louisiana media; (9) has no independent dealers in Louisiana; (10) has never delivered or arranged to be delivered a vessel, of any kind, in the State of Louisiana; (11) has never made a sale to a resident of Louisiana other than Benjamin, and that took place in Washington; and (12) has never sent representatives, inspectors, repair or service personnel to Louisiana. *Benjamin*, 472 F.2d 723 at 729, (App. 13a).

In sum, the facts of this case led the Appellate Court to conclude, even under the broadest interpretation of the due process minimum contacts requirements (*Benjamin*, 472 F.2d 723, at 729; (App. A, at 12a)) ". . . that there is such an absence of contact by Western Boat with the territorial jurisdiction of Louisiana that the maintenance of a suit against it in Louisiana for a personal judgment offends 'traditional notions of fair play and substantial justice.'" *Benjamin*, 472 F.2d 723, at 727 (App. A, at 8a).

QUESTION PRESENTED

Did the Appellate Court err in dismissing petitioner's Louisiana suit against Western Boat because of lack of jurisdiction *in personam* over Western Boat?

REASONS FOR DENYING THE PETITION

1) The Appellate Court was correct in ruling that Benjamin, as the party invoking the jurisdiction of the

Court, failed to meet the burden of establishing jurisdiction.

2) The Appellate Court correctly held that the assertion of jurisdiction over Western Boat exceeded Federal limits.

A. The Appellate Court decision faithfully follows the decisions of this Honorable Court;

B. The Appellate Court decision does not conflict with decisions of other circuits.

ARGUMENT

I. The Appellate Court Was Correct In Ruling That Benjamin, As The Party Invoking The Jurisdiction Of The Court, Failed To Meet The Burden Of Establishing Jurisdiction.

This Honorable Court has held that the party seeking to invoke the jurisdiction of a Federal Court has the burden of establishing jurisdiction, when it is seriously challenged. "If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The Fifth Circuit has followed that guideline, and appropriately held that the party invoking the jurisdiction of a Court has the burden of establishing that jurisdiction exists, and that the burden is not shifted to the challenging party to disprove jurisdiction. *Tetco Metal Products, Inc. v. Langham,*

387 F.2d 721 (5th Cir., 1968); *Gaitor v. Peninsula and Occidental S. S. Co.*, 287 F.2d 252 (5th Cir., 1961).

The Appellate Court followed those precedents and concluded that Benjamin had failed to meet that burden as to his Louisiana suit against Western Boat. *Benjamin*, 472 F.2d 723, at 731 (App. A. at 18a). This is not at all to say that Benjamin failed for lack of opportunity because that is not the case. It is to say that, after all the facts were made known to and assessed by the Appellate Court, that Court held that Benjamin had not proved jurisdiction.

II. The Appellate Court Correctly Held That The Assertion Of Jurisdiction Over Western Boat Exceeded Federal Limits.

In his petition for writ, Benjamin essentially argues that, since the boat in question was built for a Louisiana resident and was to be home-ported in Louisiana, jurisdiction is conferred by virtue of *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957) or, failing that, by virtue of the "stream of commerce" theory.

Benjamin makes references in his Petition to "extensive preliminary negotiations" between him in Louisiana and Western Boat in Washington. These references must have been inadvertently made, because none of these negotiations occurred in Louisiana. All contract negotiations took place by and between Western Boat in Washington and McAleer in Virginia. Moreover, all discussions, correspondence, and communications among all parties at any time always concerned a

vessel contracted for, built, inspected, delivered and accepted in the State of Washington.

Similarly, unfortunate and unfounded references are made in Benjamin's Petition for Writ that Western Boat shipped the vessel to Benjamin in Louisiana. As the Appellate Court properly observed, Benjamin went to Tacoma and *there* accepted delivery and took physical possession of the boat. Benjamin sailed it on the West Coast and he, Benjamin, shipped it from San Francisco to Tampa, Florida and *not* to New Orleans, Louisiana. *Benjamin*, 472 F.2d 723, at 728 (App. A, at 11a).

The implication that Benjamin, as a Louisiana resident, was going to use his boat solely in Louisiana, as reflected by its being home-ported in New Orleans, is misleading. It is clear that Benjamin resided sometime in New Orleans, sometime in North Carolina, and spent a good portion of his time in leisure and business activities in various other areas of the United States and abroad. The vessel was to be used extensively and, as a matter of fact, was used extensively in non-Louisiana waters. As this Honorable Court is well aware, the designation of a home port is primarily an incident of U. S. Coast Guard licensure. As the Appellate Court properly held, the factor of home porting in this case was of no jurisdictional moment since the contract called for delivery "free of liens of any kind", since there were in fact no liens, and since this isolated sale took place in the State of Washington. *Benjamin*, 472 F.2d 723, at 730 (App. A, at 15a-16a).

A. *The Appellate Court decision faithfully follows the decisions of this Honorable Court.*

Benjamin would seek to have *McGee, supra,* throw a cloak of jurisdiction over a set of unfavorable facts. Benjamin would have no reference made and, in fact, makes no reference to *Hanson v. Denckla,* 357 U.S. 235 (1958) and he makes only passing reference to *International Shoe Company v. State of Washington,* 326 U.S. 310 (1945).

The Appellate Court properly considered all three landmark cases. It found that *McGee* did not stand for the proposition that Benjamin sought to enunciate. *McGee* just did not hold, whenever there is a contract between citizens of two States, that both States have jurisdiction. Nor did *McGee* stand for the proposition that such a contract, coupled with correspondence between the parties, confers jurisdiction. *McGee* did stand for the proposition that due process requirements for jurisdiction were satisfied in the case of a non-resident insurer, which initiated the contact that ripened into a contract of life insurance, which delivered the policy to the decedent in the forum State, in that instance where the crucial witnesses (to the policy defense of suicide) all lived in the forum State.

In contrast, as the Appellate Court noted, the instant case obviously does not involve insurance nor a State statute providing its residents with effective redress against foreign insurers. Further, as the Appellate Court noted, Western Boat did not initiate the transaction; nor did Western Boat make delivery in Louisi-

ana. Further, by no means do all crucial witnesses reside in Louisiana. Benjamin is challenging the caliber of the vessel construction, all of which construction was done by Washington residents at Tacoma.

Directed by *Internation Shoe*, the Appellate Court in this case also asked: did Western Boat have sufficient minimum contacts with the forum State of Louisiana to permit the suit to be maintained in Louisiana without offending due process? The legal standard is correct. The answer was correct: "Maintenance of this action against Western Boat in Louisiana would *unquestionably* 'offend traditional notions of fair play and substantial justice.'" (Emphasis supplied; reference omitted.) *Benjamin*, 472 F.2d 723, at 731 (App. A, at 18a).

Directed by *Hanson*, the Appellate Court also asked whether Western Boat purposefully availed itself of the privilege of conducting activities in Louisiana so as to invoke the benefits and protections of its laws. The Court held that not even under "the broadest interpretation" could it find that Western Boat had so conducted itself. *Benjamin*, 472 F.2d 723, at 729 (App. A, at 12a).

In short, the Appellate Court considered this case in light of all due process jurisdictional approaches.[2]

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[2]The Appellate Court also considered a number of other jurisdictional cases in reaching its decision. *Benjamin*, 472 F.2d 723, at 726-727 (App. A, at 4a-8a). These cases involved claims on *contracts* made outside the forum State. The decisions required certain minimum contacts with the forum other than a *res* within the forum in order to satisfy "traditional notions

It found jurisdiction over Western Boat under none. Petitioner's contention that the Appellate Court insisted on a higher standard ("physical in-state business activity") than is required by this Honorable Court is obviously unfounded.

B. *The Appellate Court decision does not conflict with decisions of other circuits.*

In an effort to interest this Honorable Court with another theory of jurisdiction, Benjamin suggests a conflict in the circuits over the "stream of commerce" theory. The suggestion is ill-founded and, in fact, unfounded. There simply is no such conflict in the circuts. Further, even if there were a conflict, the theory would be inapplicable in this case.

The Fifth Circuit on at least two other occasions has specifically used the "stream of commerce" theory: *Eyerly Aircraft Co. v. Killian*, 414 F.2d 591 (5th Cir., 1969) and *Coulter v. Sears Roebuck & Co.*, 426 F.2d 1315 (5th Cir., 1970). Moreover, the Fifth Circuit carefully considered that theory in this case. *Benjamin*, 472 F.2d 723, at 726, 730 (App. A at 4a, 6a, and at 16a). However, it found Benjamin entitled to no relief under that theory because this case not only involved one isolated sale, *but it involved a sale which took place in the State of Washington. Benjamin*, 472 F.2d 723, at 730 (App. A, at 15a-16a).

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of fair play and substantial justice". See *Owen of Georgia, Inc. v. Blitman*, 462 F.2d 603 (5th Cir., 1972), *Hamilton Bros., Inc. v. Peterson*, 445 F.2d 1334, (5th Cir., 1971); and *Florida Towing Corp. v. Oliver J. Olson & Co.*, 426 F.2d 896 (5th Cir., 1970).

The Appellate Court felt no need in this case to go further and distinguish the "stream of commerce" products liability cases sounding in tort, involving personal injuries or delictual damage occurring in the forum State, where all the pertinent witnesses to the accident or injuries reside. The cases cited in the Petition for Writ in support of the "stream of commerce" theory — unlike the instant case — are all tort, products liability, personal injury cases.

The only decision of another circuit cited by Benjamin is *Florio v. Powder Power Tool Corp.*, 248 F.2d 367 (3rd Cir., 1957). The case involved a claim for personal injuries suffered by a minor when a power tool, manufactured by the non-resident defendant, misfired and caused a steel stud to be imbedded in the minor's brain. The Court found the non-resident manufacturer amenable to jurisdiction because of a systematic scheme of sales promotion in the forum State, because it had a tightly-regulated exclusive distributor who regularly sold its products in the forum state, because it had a direct employee who regularly did promotional work and repair work in the forum State, and because the distributors' contracts were considered as executed in the forum state. The Court specifically mentioned the presence of the crucial witnesses in the forum state. One can easily see, if *Florio* is truly a "stream of commerce" case, which is certainly subject to question, that, in any event, it involves a whole set

of circumstances and activities not present in this case.[3]

The case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961) is certainly an interesting case and is considered by

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[3]Further, neither *Florio, supra,* nor the other cases cited by Benjamin support his suggestion that "stream of commerce" is a separate jurisdictional standard, wholly prescinding from the due process jurisdictional critera, enunciated by this Honorable Court.

None of the Federal District Court opinions cited by Benjamin are pertinent to this case. The case of *Etzler v. Dille and McGuire Manufacturing Company*, 249 F.Supp. 1 (W.D. Va., 1965) is inapposite (personal injury products liability case arising from plaintiff's suffering an amputated leg when the non-resident manufacturer's rotary lawn mower malfunctioned; but the Court found substantial revenue derived from the sale of mowers in the forum State and a persistent course of direct shipment of the mowers to purchasers in the forum State); The case of *Keckler v. Brookwood Country Club*, 248 F.Supp. 645 (N.D. Ill., 1965) also is not pertinent inasmuch as it, too, involved personal injuries resulting from a motorized golf cart, but the court found no jurisdiction as to an alleged strict liability claim because of the absence of even allegations of broadspread distribution of products in volume. In *Hartford v. Smith*, 257 F.Supp. 578 (N.D., W.Va., 1966), the Court considered another personal injury suit arising from the explosion of a bottled-gas cooking stove, manufactured by a non-resident company which admittedly advertised, and directly solicited sales on a regular basis in the forum State.

In *Jackson v. National Linen Service Corp.*, 248 F.Supp. 962 (W.D., Va., 1965), the Court held a non-resident solvent manufacturer amendable to jurisdiction in a suit for personal injuries sustained when the solvent exploded. The non-resident filled orders directly to customers of the forum State, sent direct advertising materials to them, and had substantial, persistent direct and indirect sales to residents of the forum State. The case of *Anderson v. Pennscraft Tool Co.*, 200 F.Supp. 145 (N.D., Ill., 1961) involved another personal injury action against a non-resident company, which apparently regularly sold its tools to customers in Illinois (the forum State) from the adjoining State of Michigan.

some to be the landmark case on "stream of commerce." However, it is of little assistance to the Court in this case. *Gray*, also, is a personal injury case arising from an explosion of a water heater, whose safety valve was allegedly improperly constructed. The non-resident manufacturer of the safety valve was held to have committed a "tortious act", within the contemplation of the Illinois "long-arm" statute, in the forum State because of the occurrence of the injury or final element of the tort in the forum State. Unlike what Benjamin states in his Petition for Writ, the Illinois Supreme Court did not find only an isolated or single instance of product-use in the forum state. To the contrary, the Court concluded that there was "a substantial use and consumption in this State" of th on-resident manufacturers' valves and that its business was directly affected by transactions in the forum State, and that it enjoyed benefits from the laws of the forum State. *Gray, supra*, 22 Ill.2d at 441-443, 176 N.E.2d at 766.[4]

In summary, there is no conflict in the circuits regarding the "stream of commerce" theory; and the theory is not applicable in this instance in any event. Western Boat did not put the boat into the stream of

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[4]The discussion of *Gray*, and its emphasis on construction of a State statute brings to mind the issue of Louisiana law, which the Appellate Court herein did not reach. Respondent remains firmly of the opinion that the scope of the Louisiana "long-arm" statute (La.R.S. 13:3201) is not broad enough to confer jurisdiction over Western Boat on the facts of this case. Nonetheless, even if Respondent were incorrect in that regard, it would follow that the assertion of such jurisdiction would run contrary to the due process requirements of the United States Constitution.

interstate commerce. It sold the boat in Washington to Benjamin, who had it built there, who inspected it there, and who accepted delivery there.

CONCLUSION

The well-reasoned opinion of the Appellate Court in this instance reached the only fair and proper conclusion. Its decision should be maintained by this Honorable Court, and the Petition for Writs of Certiorari should be denied.

All of which is respectfully submitted,

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CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been served upon each of the following

named at the stated addresses, by depositing the same, full postage prepaid, in the United States mail: Petitioner, Edward B. Benjamin, through his counsel of record, William A. Porteous, III, Esquire, 704 Carondelet Street, New Orleans, Louisiana 70130; and to Hendrik Uiterwyk, Esquire, 2141 International Trade Mart Building, New Orleans, Louisiana, 70130; and to Gerard H. Schreiber, Esquire, 8137 Oleander Street, New Orleans, Louisiana, 70118; and to Alan Y. Cole, Esquire, 1730 "K" Street, N. W., Washington, D. C., 20006.

New Orleans, Louisiana, this ____ day of September, 1973.

HENRY B. ALSOBROOK, JR.